FILE COPY

Office Supreme Court
FILED
FEB 8
CHARLES ELMORE

No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1928

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. BARFORD, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

U.S. GOVERNMENT PRINTING OFFICE: 1929

INDEX

	Page
Opinions below	1
Jurisdiction	1
The question presented	2
The statutes involved	2
Statement	4
Argument	5

CITATIONS

Cases:	
Great Lakes D. & D. Co. v. *Kierejewski*, 261 U. S. 479	5
Gulf, Colorado, etc. Ry. Co. v. *McGinnis*, 228 U. S. 173	5
Northern Coal and Dock Company v. *Strand*, October Term, 1928, No. 41, decided December 10, 1928	5–6
Second Employers' Liability Cases, 223 U. S. 1	5
Western Fuel Company v. *Garcia*, 257 U. S. 233	5
Statutes:	
Merchant marine act of 1920, sec. 33, c. 250, 41 Stat. 988, 1007 (U. S. C., Title 46, Sec. 668)	2–3
Federal employers' liability act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65 (U. S. C., Title 45, Sec. 51)	3–4
Suits in admiralty act of March 9, 1920, c. 95, 41 Stat. 525 (U. S. C., Title 46, Sec. 741 et seq.)	4

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 629

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. Barford, Deceased, petitioner

v.

UNITED STATES OF AMERICA ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia is not reported but is found at pages 34–37 of the Record. The Circuit Court of Appeals reversed the District Court in an opinion reported in 28 F. (2d) 725. (R. 45–53.)

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered on October 19, 1928. (R. 55.) Petition for certiorari was filed January 15, 1929. Jurisdiction is conferred upon

this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The single question presented is whether the personal representative of a deceased seaman who left no dependents is entitled to recover damages for the death of his decedent, incurred through fault of the officers in charge of the Government vessel, under the statute of the State of Virginia, which does not require a showing of dependency, or whether the right to recovery given by the Jones Act (Section 33, Merchant Marine Act, 1920, c. 250, 41 Stat. 988, 1007, U. S. C., Title 46, Sec. 688), which does require a showing of dependency, is exclusive.

THE STATUTES INVOLVED

Section 33 of the Merchant Marine Act of 1920 (c. 250, 41 Stat. 988, 1007; U. S. C., Title 46, Sec. 688) provides:

> That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:
>
> "SEC. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such per-

sonal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65; U. S. C. Title 45, Sec. 51), provides, in Section 1:

> That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such car-

rier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT

The administrator filed a libel, by authority of the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525; U. S. C., Title 46, Section 741 et seq.), to recover damages for the death of his decedent through the negligence of the officers of the Government vessel *Hybert*. Exception was filed to the libel because it did not allege that the decedent left surviving him any widow or children or parents or next of kin dependent upon him, or that the suit was instituted in behalf of such dependents. (R. 10.) Although it was established that the decedent left no dependents, the District Judge was of the opinion that recovery could be had under the Virginia Death Statute (Section 5786 of the Code of Virginia), and as dependency is not required for recovery under that statute, decree was entered for the administrator. (R. 37.) Appeal was taken and the single question was whether the administrator of the deceased seaman, as he left no dependents, was entitled to recovery, upon the theory that the Jones Act provided an exclusive remedy, and as dependency was a condition of recovery the action could not be maintained. If the Jones Act provides an exclusive remedy, the ruling of the Circuit Court of Appeals was correct. If the action could be maintained under the Vir-

ginia Death Statute, the ruling of the District Judge was correct. The death occurred within the State of Virginia.

ARGUMENT

It is conceded that State Death Statutes apply in cases of personal injury resulting in death of seamen prior to legislation on the subject by Congress. (*Western Fuel Company* v. *Garcia*, 257 U. S. 233; *Great Lakes D. & D. Co.* v. *Kierejewski*, 261 U. S. 479.) It is equally well settled that as soon as Congress has acted, the legislation of the States is superseded and that of Congress becomes supreme and exclusive. *Second Employers' Liability Cases*, 223 U. S. 1, 54. Congress has so legislated by Section 33 of the Merchant Marine Act which makes applicable the provisions of the Federal Employers' Liability Act to seamen. Section 1 of that Act makes dependency a condition to right of recovery. *Gulf, Colorado, etc., Ry. Co.* v. *McGinnis*, 228 U. S. 173.

We consider the question is answered by the opinion of this Court in the case of *Northern Coal and Dock Company* v. *Strand*, October Term, 1928, No. 41, decided December 10, 1928, where the rule is thus stated:

> We think it necessarily follows from former decisions that by the Merchant Marine Act—the measure of general application—Congress provided a method under which the widow of Strand might secure damages

resulting from his death, and that no State statute can provide any other or different one.

It follows the application for certiorari is without merit and should be denied.

WILLIAM D. MITCHELL,
Solicitor General.
GEORGE R. FARNUM,
Assistant Attorney General.
J. FRANK STALEY,
Attorneys for the United States.

FEBRUARY, 1929.

○